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COMMENTS

UNANSWERED QUESTIONS IN THE RECENT PASSPORT CASES

By BILL L. HOISINGTON*

Introduction

The increasing interest in international affairs has not been restricted to those in the national government who have been charged with the nation's defense from foreign aggression. Daily more and more private citizens are deciding that their economic well-being and personal happiness depend upon their moving about the world and dealing with foreign persons and institutions. And to these citizens the regulation of their movements abroad is another aspect of the ancient struggle between the individuals of a country and their government.

To those who have found themselves at the hub of the present-day expression of that aged battle for personal liberty, resolution of that conflict is of prime importance. But, although an understanding of the nature of the conflict is of considerable importance here, this discussion does not seek to resolve that particular problem.

The central concern of the considerations which follow is much narrower. The center of focus is *the power to restrict the foreign travel of citizens,* its location in the federal government, and its characteristics. Problems involving the *exercise* of that power are certainly important, but they do not constitute the main theme of interest.

Nevertheless, before the power can be advantageously discussed as such, a proper perspective must be laid by reference to a factual situation in which it was intimately involved.

A Problem for the Courts

In March of 1954, Mr. Weldon F. Dayton applied for a passport to enable him to travel lawfully to India where he was to accept a position as research physicist at the Tata Institute of Fundamental Research. The Director of the Passport Office informed him that his application was denied because ". . . it would be contrary to the best interests of the United States to provide you passport facilities at this time."[1] Mr. Dayton, upon request, executed an affidavit stating that he was not then and never had been a Communist.[2] After a second denial, Mr. Dayton filed an appeal to the Board of Passport Appeals.[3] The Board, after a hearing, submitted its recommen-

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[1] Quoted in Dayton v. Dulles, 357 U.S. 144, 145 (1958).

[2] The affidavit may be required under 22 C.F.R. § 51.142. See note 6 *infra.*

[3] 22 C.F.R. § 51.138 (1952) provides: "In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139." 22 C.F.R. § 51.139 (1952) provides in substance for a Board composed of three officers of the Department of State designated by the Secretary of State. The Board makes its own rules and the applicant is accorded the right to inspect the transcript of his own testimony and to be represented by counsel.

dation to the Secretary of State who, after reviewing the testimony and evidence brought forth at the hearing and a confidential file of investigative reports (which the Board had examined but which the petitioner had not[4]), denied the application.

In April of 1955, Dr. Walter Briehl, a psychiatrist, applied for a passport to attend an International Psychoanalytic Congress in Geneva and a World Mental Health Organization Congress in Istanbul. Dr. Briehl flatly refused to submit any affidavit concerning membership in the Communist Party and as a result the Director disapproved the application stating: "In your case it has been alleged that you were a Communist."[5] Dr. Briehl persisted in his refusal to submit the affidavit saying that his past beliefs and associations were immaterial to his right to a passport.[6] The Board refused to entertain any appeal until he complied with the Passport Division's request.[7]

Beginning in August of that same year, similar events occurred with respect to the application of Mr. Rockwell Kent for a passport to visit England and to attend the "World Council of Peace" in Helsinki, Finland. Mr. Kent also refused to submit an affidavit concerning Communist Party membership and his application was denied for reasons similar to those given Dr. Briehl.

Mr. Kent and Dr. Briehl sued separately in the District Court for the District of Columbia for declaratory relief. Both cases were summarily dismissed. The Court of Appeals heard the two cases *en banc* and affirmed by a divided vote.[8] Meanwhile, Mr. Dayton had suffered corresponding misfortune after lengthy and complicated legal proceedings.[9] Certiorari to the Supreme Court was granted all three cases in early 1958.[10]

On June 16, 1958 the decisions of the Court of Appeals were reversed.[11] The passports were issued. In so acting, the Court placed new landmarks

[4] 22 C.F.R. § 51.163 (1954) provides, *inter alia*:

". . . The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods."

[5] Kent v. Dulles, 357 U.S. 116, 119 (1958), quoting the Director.

[6] 22 C.F.R. § 51.142 (1952) provides:

". . . [T]he applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If the applicant states that he is a Communist, refusal of the passport in his case will be without further proceedings."

[7] 22 C.F.R. § 51.156 (1954) provides that prior to petition for an appeal, an applicant shall comply with section 51.142 if the provisions of that section have been deemed necessary by the Passport Office.

[8] 248 F.2d 600 (D.C. Cir. 1957); 248 F.2d 561 (D.C. Cir. 1957).

[9] Dayton v. Dulles, 237 F.2d 43 (D.C. Cir. 1956) (reversing the district court's summary judgment for the Secretary and remanding to him for disclosure of the basis of his decision). See "Decision and Findings . . . ." attached as appendix to 357 U.S. 144, 150–54 (1958) for the compliance by the Secretary. Then see Dayton v. Dulles, 254 F.2d 71 (D.C. Cir. 1957), *affirming* 146 F. Supp. 876 (D.D.C. 1956) (second summary judgment for the Secretary after his compliance).

[10] 355 U.S. 911 (1958); 355 U.S. 881 (1958).

[11] 357 U.S. 144 (1958); 357 U.S. 116 (1958).

in a struggle which was raging full-blown at the time of the Magna Carta but which, until recently, was seldom felt in this country. The historical perspective of this problem is essential to any rational understanding of it.

Historical Background: The Passport and the Right to Travel

> Next to personal security, the law of England regards . . . the personal liberty of the individual. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclinations may direct without imprisonment or restraint, unless by due course of law .... [I]t is a right strictly natural; ... it cannot be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. —Blackstone[12]

The Magna Carta, as signed by John Lackland at Runnymeade in 1215, deprived the King of the right to prevent his subjects from traveling in or out of the country. But John died very shortly afterward and William Marshall, regent for young Henry III, republished the charter without these particular guarantees except as regards the travel of merchants. Immediately after that time the English Kings often exercised control of citizens' travel abroad, usually through the issuance of a writ *Ne Exeat Regnum*.[13] Gradually, however, the use of the writ was more and more limited to equity cases.[14] And because of the writ's limited use by the middle of the Eighteenth Century, it was commonly assumed that the right to travel about from nation to nation knew few formal restrictions and those only in extraordinary circumstances.[15]

It is little wonder then that the Constitution is silent on the specific matter of foreign travel restrictions. The "due process" clause of the fifth amendment expounds the basic limitation upon any exercise of governmental authority which deprives the citizen of "life, liberty, or property." Still, if there is a power which may, with "due process," deprive a citizen of his liberty with respect to foreign travel, the Constitution is not explicit on where it resides.

The freedom to travel between the several states was early recognized as a sacred constitutional guarantee.[16] But the right to travel outside the United States did not receive the benefit of such consecration until quite recently. The reason for that delay was that the right to travel freely

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[12] 1 BLACKSTONE, COMMENTARIES *134.

[13] See generally, Note, 41 GEO. L.J. 63, 64–70 (1952). BLACK, LAW DICTIONARY (4th ed. 1951) gives, in part, on *Ne Exeat Regno*: ". . . It was formerly used for political purposes, but is now only resorted to in equity when the defendant is about to leave the kingdom; . . . ." See also *id., Ne Exeat Republica*; note 61 *infra*.

[14] See Note, 41 GEO. L.J. 63, 69–70 (1952). See also discussions in 38 AM. JUR. *Ne Exeat* §§ 1–6 (1941) and 65 C.J.S. *Ne Exeat* § 1 (1950).

[15] See Boudin, *The Constitutional Right to Travel,* 56 COLUM. L. REV. 47, 48 (1956); Parker, *The Right to Go Abroad: To Have and to Hold a Passport,* 40 VA. L. REV. 853, 866–67 (1954).

[16] Crandall v. Nevada, 73 U.S. (6 Wall.) 445, 749 (1868). See generally Edwards v. California, 314 U.S. 160 (1941); Hess v. Pawloski, 274 U.S. 352 (1927); Williams v. Fears, 179 U.S. 270, 274 (1900).

abroad, except in times of war, was seldom denied a citizen of this country prior to 1953. Such restrictions or hindrances to free travel as have been forthcoming have usually taken the form of a denial of the right to a passport. And such a denial might or might not have had the effect of conclusively precluding lawful travel abroad depending upon whether a passport was, at the time of denial, an essential prerequisite of lawful exit and entrance. It will be seen that passports were *not* prerequisite to lawful travel throughout most of this nation's history.

Attitude of Courts and Congress to 1939

In 1803 Congress prohibited issuance of a passport to an alien which certified him to be a citizen.[17] During the War of 1812, it became unlawful for a citizen to cross the frontier into enemy territory without a passport issued by the Secretary of State or other designated official.[18]

In 1835 the Supreme Court declared that a passport was not admissible as evidence of citizenship.[19] The Court declared that a passport was a mere request to a foreign power that the bearer pass safely and freely. The Court said further that the issuance of a passport was entirely within the discretionary power of the Secretary of State. But as an indication of the "looseness" of the passport issuing procedure at that time, the court alluded to the fact that the Secretary had made no inquiry to ascertain the fact of citizenship.[20]

Congress enacted the nation's basic passport statute in 1856.[21] Its sole restrictive aspect was that only the Secretary of State was empowered to issue such a document. Ten years later Congress provided that passports might only be issued to citizens,[22] and no other categories of eligibility were then established.

There followed some fifty odd years during which the passport was issued as a matter of course and was the subject of few judicial inquiries.[23]

The First World War saw Congress, as in the War of 1812, make it unlawful to travel abroad without a valid passport.[24] The force of this wartime provision was ended by Joint Resolution on March 3, 1921 and the

[17] Act of February 28, 1803, ch. 9, § 1, 2 Stat. 205 (1803).

[18] Act of February 4, 1815, ch. 31, § 10, 3 Stat. 199 (1815).

[19] Urtetiqui v. D'Arbel, 34 U.S. (9 Pet.) 692 (1835).

[20] *Id.* at 699.

[21] Act of August 18, 1856, ch. 127, § 23, 11 Stat. 52, 60-61 (1856).

[22] Act of May 30, 1866, ch. 102, 14 Stat. 54 (1866). The act provides that passports shall be issued only to citizens. This provision was amended by 32 Stat. 386 (1902), 22 U.S.C. § 212 (1952) to read:

"No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

[23] Miller v. Sinjen, 289 F. 388, 394 (8th Cir. 1923) (issuance of passport declared a discretionary act of Secretary of State); *In re* Gee Hop, 71 F. 274 (N.D. Cal. 1895) (passport was declared not valid evidence of citizenship); and the cases cited in notes 26 and 27 *infra.*

[24] Act of May 22, 1918, ch. 81, § 2, 40 Stat. 559 (1918). The provision was in force during presidential proclamation of emergency. The proclaimed emergency began on August 8, 1918 [Proc. of that date, 40 Stat. 1829 (1918)].

country returned to its normal condition in which the passport was not necessary to lawful travel abroad.[25]

Judicial determinations during the period 1866–1938 contributed no new thinking on the nature of the power to restrict international travel except for a single case only indirectly related in its facts.[26] The Supreme Court, considering a power Congress claimed to possess, indicated in 1932 that the power of the United States to limit foreign travel was similar to the prerogative of the English Sovereign.[27] As has been noted previously, this power was limited in its use by the English Sovereign. But the comment is significant in recognizing that a power to restrict foreign travel of some sort exists somewhere in the federal government and exists there sometimes even in the absence of war-time emergency.

Post 1939: A Right and a Requirement

It was not unlawful to travel abroad without a passport in 1939. The passport was thought to be a kind of privilege grantable at the free discretion of the Secretary of State—as it had been assumed to be for many years. But in that year the Supreme Court decided *Perkins v. Elg*[28] and placed the first of several restraints upon the Secretary's authority in this area. Where the Secretary had made an erroneous finding of mixed law and fact relating to the citizenship of a passport applicant, the Court declared that the Secretary could not refuse to issue a passport solely upon *those* grounds. This meant two things: (1) Whether the Secretary did or did not issue the passport was not something purely discretionary with him; and (2) the passport, even though it was not essential to lawful international travel at the time, was recognized as something to which a citizen had some sort of limited right (viz: the citizen cannot be denied the passport without "due process of law").

All of the cases which came before the courts, then, prior to the Second World War really involved whether a citizen would be entitled to a passport or whether a passport was valid evidence of citizenship. And since all of these cases were tried at times when it was not unlawful to travel abroad without a passport, the Court had not squarely met the question of whether a citizen could lawfully be denied his right to travel abroad altogether.

The Second World War resulted in absolute restrictions on lawful foreign travel as had previous wars in which the United States was involved.[29] But in 1947 and following, even in the absence of a "shooting" war, the Secretary continued his wartime restrictions in effect.[30] The Secretary's

[25] Joint Resolution of March 3, 1921, ch. 136, 41 Stat. 1359 (1921).

[26] Blackmer v. United States, 284 U.S. 421 (1932).

[27] *Id.* at 437–38. See also Blair v. United States, 250 U.S. 273, 281 (1919).

[28] 307 U.S. 325 (1939).

[29] See notes 18 and 24 *supra*. The act which made these restrictions effective was the Act of June 21, 1941, ch. 210, 55 Stat. 252 (1941).

[30] These were the old provisions of 22 U.S.C. §§ 223–26b which were repealed June 27, 1952 [ch. 477, Title IV, § 403(a)(15), 66 Stat. 279 (1952)]. The passport requirements contained in these provisions are now found in Subchapter II of Chapter 12 of Title 8, Aliens and Nationality. See note 32 *infra*.

position was solidified in January of 1953 when President Harry Truman invoked[31] the provisions of Section 215 of the Immigration and Nationality Act of June 27, 1952 (Section 1185) which provides, *inter alia*,[32]

> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and the President shall find that the interests of the United States require that restrictions and prohibitions *in addition to those provided otherwise than by this section* be imposed upon the departure of persons from and their entry into the United States and shall make public proclamation thereof . . . . (Emphasis added.)
>
> . . . .
>
> (b) After such proclamation . . . has been made . . . it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Thus it was that the foundation was laid for the collision of the rights of *Messrs.* Dayton, Briehl, and Kent with the power of the Secretary of State.

The ensuing discussion does not concern itself primarily with factors involved in balancing the conflicting interests of the individual passport applicant and those of the national government. It will be seen that the rights of individuals with respect to foreign travel are to be protected in much the same manner regardless of *where* in the Government scheme the power to regulate such travel is found to exist. Therefore, the focus of the remaining discussion shifts from the effect of the *exercise* of a power upon individuals to the effect of the *residence* of a power upon the nation as a whole.

The Power to Regulate Travel

The Secretary's power to establish substantive categories of passport eligibility stems from one of two sources. First, the power may be delegated to him as a member of the executive branch by Congress. And second, the power may come to him through the President's exercise of an "inherent" executive power.

A Delegated Power?

The congressional provision found in 22 U.S.C. section 211a is entitled: "Authority to grant, issue and verify passports."[33] It reads in part as follows:

> The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports.

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[31] Proc. No. 3004 of January 17, 1953, 67 Stat. C31 (1953).
[32] Immigration and Nationality Act § 215, 66 Stat. 190, 8 U.S.C. § 1185 (1952).
[33] 44 Stat. 887 (1926), 22 U.S.C. § 211a (1952).

This act does not contemplate the fact that a passport might be essential to lawful foreign travel since it was enacted at a time when there was no such requirement.

The provisions of the Immigration and Nationality Act dealing with passport control are the expressions of Congress upon that situation.[34] Section 1185 is a tiny portion of a voluminous legislative effort. *The major purpose of the entire act was the control of aliens entering and leaving the country.*[35] It is logical to assume that the purpose of requiring citizens to carry passports was to enable port officials and others to identify them with more certainty than would otherwise be possible.

This view of the provision is supported by the actions of Congress in 1956. Representative Walter introduced legislation which would have provided the Secretary with powers at least as broad as those claimed in the principal cases.[36] The bill was entitled: "A bill to amend the Administrative Procedure Act[37] and the Communist Control Act of 1954[38] so as to provide for a passport review procedure and to prohibit the issuance of passports to persons under Communist discipline."[39] This bill died in committee. It is perhaps arguable that Congress believed it had already delegated substantially this authority in Sections 211a or 1185 or both, and that no further legislation was needed. But it is certainly not unreasonable to conclude that when Congress declines the opportunity to provide expressly for what has been previously left to implication, there is some evidence that Congress is not yet clear in its own mind what the proper interpretation of the previous legislation ought to be.

The only other congressional expression in this area of passport power is found in the Internal Security Act of 1950.[40] In part it provides as follows:

> . . . .
>
> (8) Due to the nature and scope of the world Communist movement . . . travel of communist members . . . from country to country facilitates communication and is prerequisite for the carrying on of activities to further the purposes of the Communist movement.
>
> (9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States. . . .

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[34] See note 32 *supra.*

[35] See discussion in KANSAS, IMMIGRATION AND NATIONALITY ACT 1–20 (4th ed. 1953); *id.*, Forward to Fourth Edition by the late Sen. McCarran.

[36] H.R. 9991, 84th Cong., 2d Sess. (1956) (may be found in 102 CONG. REC. 4844 (1956)).

[37] 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1952).

[38] 60 Stat. 237 (1946), 50 U.S.C. § 782 (1952), as amended, 68 Stat. 777 (1954), 50 U.S.C. § 782 (supp. IV, 1957).

[39] Section 13 of the act provides that it shall be unlawful for any officer to issue a passport to certain persons under Communist influence. Section 14 defines the persons covered. Section 15 provides the penalties.

[40] 64 Stat. 987, 993 (1950), 50 U.S.C. §§ 781, 785 (1952).

. . . .

(a) When a Communist Organization[41] . . . *is registered* or there is in effect a final order of the Board[42] requiring such organization to register, it shall be unlawful for any member of such organization . . . (1) to make application for a passport . . . ; or (2) to use or attempt to use such passport . . . . (Emphasis added.)

It will be noted that this act is totally inoperative with respect to restrictions on passports until such organizations have registered or been ordered to register. The conditions precedent to this act (namely, the registration of such organizations) had not been realized at the time of the *Dayton, Briehl* and *Kent* cases.[43] And since Congress has taken pains to spell out in detail these Communist control provisions and procedure in *this* act, it is strong evidence that Congress did not yet consider itself to have granted the Secretary those powers.

The interpretation to be given those acts which did purport to delegate power to the President and Secretary with respect to travel restrictions presents a more difficult problem of construction.[44] Certainly, in searching for help along these lines, deference should be given the President's own interpretation of his power. But, strangely enough, it is difficult to find *any* statement by the President in the form of an executive order which indicates that the President believed the Secretary could be given the power to establish substantive categories of passport eligibility. For instance: Executive Order No. 7856[45] put section 211a[46] into effect. It designated only one genuine category of passport eligibility—citizenship and allegiance.[47] The rest of the rules promulgated *at that time* were strictly formal requisites of application.[48]

Nor did Proclamation No. 3004, which made operative the provisions of section 1185,[49] seem to give the Secretary such authority; for, although the section made a passport a prerequisite of lawful international travel, *it did not alter the past requisites for receiving a passport nor add any new categories of eligibility.* Reading the proclamation in context, the meaning which it reasonably should be given is that it granted the Secretary the power to require American citizens to prove their identity when entering

[41] *Id.* § 782 provides the statutory definition of "Communist Organization."

[42] *Id.* § 791 establishes a five member board, appointed by the President which shall upon application of the Attorney General determine whether any organization falls within the definitions provided by section 782 and whether any individual is a member of such group. The registration procedure is provided in section 786. The penalties are outlined in section 794.

[43] 357 U.S. at 121 n.3.

[44] 44 Stat. 887 (1926), 22 U.S.C. § 211a (1952); 66 Stat. 190, 8 U.S.C. § 1185 (1952).

[45] Exec. Order No. 7856, 3 Fed. Reg. 799 (1938) redesignated by Dept. Reg. 108.77, 13 Fed. Reg. 6349 (1948).

[46] See note 33 *supra.*

[47] See note 22 *supra.* 22 C.F.R. § 51.2 (1949) effected the provisions of 22 U.S.C. § 212 (1952).

[48] 22 C.F.R. §§ 51.3–.34 (1949). Sections 51.3–.6 deal with the applications of minors; sections 51.7–.13, who may be included in one passport; sections 51.14–.17, general requirements of passports; sections 51.18–.22, names and titles; sections 51.23–.26, contents of applications for a passport; sections 51.27–.34, amendment of passports.

[49] See note 32 *supra.*

or leaving their country by means of a passport. There certainly are no provisions for determining which Americans are to receive passports and which are not.[50]

Taken in context then, neither the orders nor proclamations of the President nor the statutes upon which they were based *expressly* conveyed to the Secretary the power to deny a citizen a passport upon a legitimate request for any reason save citizenship, allegiance, or prior crime.[51]

Narrow Judicial Construction

The right to travel abroad involves the liberty of the individual. This "liberty" is protected by the fifth amendment of the Constitution.[52] If the Secretary has the power claimed by him in *Dayton, Briehl* and *Kent,* he has the power to deny a citizen this constitutional privilege. Where statutes will raise serious constitutional questions if interpreted broadly, it is the practice of the courts to construe them narrowly.[53] With the present cases the statutes involved will admit reasonably of a narrow construction. Such a construction seems quite proper since the rights, powers, and immunities of both sides of this controversy are too important to be jeopardized unnecessarily. This recognition is, perhaps, the strongest argument in situations like these for requiring that Congress speak clearly and unequivocally before recognizing that it has spoken at all.

In the three principal cases the Supreme Court declared that the petitioners were entitled to their passports because the Secretary had not been delegated the power to refuse to issue them for the reasons he gave. The Court said:[54]

> Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard [to withhold passports to citizens because of their beliefs or associations] to restrict the citizens' right to free movement.

What the Court did not say is perhaps as important as what it did say in this regard. First, the Court did not say whether the Secretary's grounds for refusal bore a "reasonable relation" to the conduct of foreign affairs.[55] Second, the Court did not say that Congress could not have given the Secretary a power very similar to the one he claimed. And third, the Court

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[50] See Judge Bazelon dissenting in Briehl v. Dulles, 248 F.2d 561, 581 (D.C. Cir. 1957).

[51] That is: fraud, attempts to escape justice, and applications by persons not owing allegiance to the United States are not "legitimate" in their basis.

[52] See 357 U.S. at 129.

[53] United States v. Witkovich, 353 U.S. 194, 201–02 (1957); United States v. Rumley, 345 U.S. 41, 48 (1953); and on similar reasoning, see Crowell v. Benson, 285 U.S. 22, 62 (1932).

[54] 357 U.S. at 130. The discussion by Mr. Justice Douglas seems to indicate only that the Court is refusing to read into section 211a and section 1185 any more than is absolutely necessary. But the tenor of his discussion leaves the impression that if Congress will but steer clear of a standard based solely upon past associations and beliefs, it *can* delegate to the Secretary *some* sort of power to control the travel of citizens abroad.

[55] "Due process of law" requires that all such power bear a "reasonable relation" to proper legislative or executive purpose. See notes 74 and 75 *infra.*

gives no indication of the source of this congressional power, if Congress does possess it.

The Court's reference to the need for congressional expression is strong and the conclusion would seem to be that such power as the Secretary claimed is not only not within the "delegated" powers of the President but is not within the "inherent" powers of that office either. The Court displays the spirit of its customary technique of "strict necessity" in avoiding discussion of this aspect of the cases. But it may prove profitable to consider the question here.

An Inherent Power?

Professor Corwin in his work, *The President: Office and Powers*, states:[56]

> ... [T]he power of the National Government in the diplomatic sphere, which is susceptible of limitation by the Constitution when the restrictions which it imposes upon all power apply, is an *inherent* power, *one which owes its existence to the fact that the American People are a sovereign entity at international law.*

There would seem three possible sources of such a power. First, the power could arise as an incident of the nation's sovereignty at international law as Professor Corwin suggests. Or, it may have been inherited from the Crown of England by the Colonies acting as a unit.[57] Or lastly, it may have been passed to the federal government by the states at the time the Constitution was ratified.[58] But whichever view is taken the result is the same: the power exists in the federal government even in the absence of express delegation by the Constitution.

Assuming that such "inherent" power resides somewhere in the federal government, the passport cases present the narrower issue of whether the authority to restrict foreign travel resides initially with the Congress or is "inherently" the executive's.

Early in the nation's history, Hamilton's theory was that the executive had all powers in the field of international relations not vested elsewhere by the Constitution.[59] Madison, at the prompting of Jefferson, took issue with this view. He argued that the powers of foreign policy belonged to Congress by virtue of its power to declare war. In such a view the President would be no more than an "instrument" of the Congress in foreign affairs.[60] The dispute has never been adequately settled.

It has been urged that the President holds a power in this particular area similar to the English Sovereign's writ of *Ne Exeat Regnum*. With reference to the field of international affairs, however, the argument is not as

[56] CORWIN, THE PRESIDENT: OFFICE AND POWERS 210 (3d ed. 1948).
[57] See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316–17 (1936).
[58] Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 80–81, 91–95 (1795).
[59] CORWIN, *op. cit. supra* note 56, at 218–19.
[60] *Id.* at 219.

strong as it might seem. This power of the English King was not a part of his foreign affairs prerogative. It was part of the domestic prerogative having to do with military affairs if we are to believe Blackstone.[61] The domestic powers of the United States are delegated in large part to Congress in areas such as these. If the power is to be declared "inherent" in the president, it must not be found to have been delegated to Congress by the Constitution.

Exercise of the Executive Power

Historically the President has assumed certain exclusive prerogatives. The President is acknowledged as the sole organ of communication between the foreign powers and the United States.[62] Treaties and agreements form the "contracts" of nations and are the chief means of providing what little certainty and predictability there is in international relations. The President, with the advice and consent of the Senate, *makes* the Treaties. The President without the advice of anyone (in a manner of speaking) *makes and binds* the United States in dealings with foreign powers through executive agreements.[63] In international politics military force and threats of military force are key instruments of diplomacy. The President is Commander-in-Chief of the Army and the Navy.

In this regard Professor Corwin says:[64]

> . . . [T]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations.

In 1937, for example, an action by the United States as assignee of the Soviet Government to recover a deposit of money once the property of an extinct Russian Corporation was held by the Supreme Court to be authorized by virtue of the President being the sole organ of international relations of the United States.[65]

In so deciding the Supreme Court followed the precedent it set a year earlier in the case of *Curtiss-Wright Export Co. v. United States*. In that case the Court declared:[66]

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, *plenary and exclusive* power of the President as the sole organ of the federal government in the field of international relations . . . . (Emphasis added.)

In 1952 Justice Jackson, concurring with the decision made in the Steel

[61] 1 BLACKSTONE, COMMENTARIES *252, *262, *265.
[62] CORWIN, *op. cit. supra* note 56, at 273.
[63] United States v. Pink, 315 U.S. 203, 229 (1942).
[64] CORWIN, *op. cit. supra* note 56, at 224.
[65] United States v. Belmont, 301 U.S. 324 (1937).
[66] 299 U.S. 304, 319-20 (1936).

Seizure Case[67] which limited the *internal* power of the President in the absence of delegation from Congress, said of *Curtiss-Wright*:[68]

> That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority . . . .

It is during periods of armed conflict that international affairs become most important to the nation. At these times the inherent powers of the President *are exercised* in extraordinary fashion.[69] In the principal cases, the Court refuses to consider the powers of the Secretary in the light of war-time conditions.[70] This seems quite proper. But peace and war are labels which are *applied to* conditions after they exist. The practical significance and importance of executive powers to the nation at this particular time in world history is that they may be exercised with vigor in the *avoidance* of war as well as during its progress. The President should not be allowed to exercise *in any manner* a power which he does not properly possess.[71] But the idea that the exigencies of war can *create* in the President extraordinary powers which he had not previously *in any form* is both unreasonable and unrealistic. "Emergency," *per se*, cannot be a source of authority. The demands of war may significantly alter *the manner of exercising* powers already recognized to exist within the executive, but they ought never be said to have *created* those powers. That an "emergency" calls forth previously non-exercisable authority within the executive is not to say that such authority had no potential or latent existence within the executive prior to that calling. The source and present disposition of the power must be ascertained, it cannot be allowed to waiver about in the hands of a fictitious creature called "emergency."

In the light of this analysis the important question of the principal cases is not whether the President through the office of the Secretary of State was *justified* in refusing the passports to Mr. Dayton, Dr. Briehl, and Mr. Kent in view of the existing emergency. The question is whether or not he had the *power* to establish substantive categories of persons eligible for lawful travel abroad *under any circumstances* in the absence of an express delegation of such authority from the Congress. And the Supreme Court may have decided that latter issue in the negative.

In analyzing the significance of such a declaration (that the power to

[67] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[68] *Id.* at 635 n.2.

[69] Madson v. Kinsella, 343 U.S. 341 (1952); Duncan v. Kahanamoku, 327 U.S. 304 (1946); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

[70] 357 U.S. at 128.

[71] The fact that Congress may render the question of the legality of the President's conduct moot by subsequent ratification should not affect this policy.

restrict the foreign travel of citizens is not inherently the President's) the picture must not be clouded by considerations of "due process." Nevertheless, to see why such factors are irrelevant, it will be well to review, briefly, the nature of the "due process" protections.

Executive Power and "Due Process of Law"

It is well understood that the constitution does not recognize *any* absolute liberty which is uncontrollable in every sense. Constant threats to the health, morals, safety, and welfare of the social organization require that every personal liberty be modified by the exigencies of group need.[72] This is not contested. What is forbidden in this country is not the deprivation of liberty, but the deprivation of liberty without "due process of law."[73] In broad terms "due process" has come to require that the particular law or power shall be exercised in a manner which is not "unreasonable, arbitrary, or capricious."[74] And the courts have long stood as interpreters of what is "arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[75]

If the President of the United States has the power to control the travel of American citizens as an effective instrument of foreign policy, he will most certainly *not* have the power to act in a capricious and arbitrary manner—in violation of due process. It is true that many areas of foreign relations are considered free of judicial interference. The determination of the nature of treaty obligations,[76] the recognition of governments,[77] and even the designation of international air routes[78] have been held not justiciable. Similar handling has been given the question of the authority to control the exclusion, expulsion, and, in times of emergency, the property of aliens.[79] But a passport is not *purely* a political document.[80]

The control over passports is closely allied to—indeed a part of—the conduct of foreign affairs. That is why it should be considered part of the President's inherent power. But, since it involves a denial of personal liberty as well, it must be recognized as subject to requirements of substantive as well as procedural due process.[81]

In short, "due process" stands as a backdrop of protection to the individual citizen regardless of *where* the power under consideration is found

[72] See, *e.g.*, Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

[73] See Dennis v. United States, 341 U.S. 494, 510 (1951); in the lower court, 183 F.2d 201, 212 (2d Cir. 1950); Thomas v. Collins, 323 U.S. 516, 531–32 (1945).

[74] Nebbia v. New York, 291 U.S. 502, 510–11 (1934).

[75] Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923).

[76] Terlinden v. Ames, 184 U.S. 270 (1902).

[77] United States v. Pink, 315 U.S. 203, 229 (1942).

[78] Chicago & So. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[79] Harisiades v. Shaughnessy, 342 U.S. 580, 587–90 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[80] Shachtman v. Dulles, 225 F.2d 938, 944 (D.C. Cir. 1955); Communist Party v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954).

[81] 225 F.2d at 940.

to reside. The effect on applicants for passports is apt to be the same whether the power to restrain lawful foreign travel altogether is found to reside in Congress subject to delegation or "inherently" with the executive as an incident to the power to conduct the nation's foreign relations.

In any discussion of whether a particular activity involves the "conduct of foreign relations" close attention must be paid to the consequences of the activity sought to be controlled. And, in this regard, it should be apparent from even the most brief survey of the present international scene that the presence of American citizens in different parts of the world may be a significant factor in the conduct of foreign relations. As citizens differ in backgrounds and personalities, so will the effects of their particular presences differ as they travel from place to place in the world. The consequences of a particular individual's travel among foreign persons may be insignificant to the nation's international interests or such travel may be extremely serious depending upon the circumstances, *but such travel will always be a factor of some effect.*

Domestic Power and the Conduct of Foreign Affairs

In these recent passport cases, the Supreme Court declared:[82]

> . . . [The passport's] crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. *If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. Youngstown Sheet & Tube Co. v. Sawyer* . . . . (Emphasis added.)

Youngstown[83] dealt with the President's claim to an "inherent" *domestic* power and was distinguished from the external power questions involved in *Curtiss-Wright.*[84]

The authority involved in the principal cases is clearly an authority to control international travel. International travel is an important political factor in modern international relations. The Court declares that the authority to control foreign travel by passport denials *at this time* in history is predominantly a "domestic" power and is, therefore, properly within the law-making authority of Congress. The Court admits that if a "political question entrusted to the Chief Executive by the Constitution" were involved the case would be different.[85] But since personal liberty is to be regulated, the power must be said to reside initially with Congress.

Several things are apparent. To say that whenever the personal liberty of a citizen is denied by the exercise of a power, the power becomes *ipso facto* "domestic" is to err. The concepts of "foreign relations" and "individual liberty" are not mutually exclusive. If a power is one essentially involving foreign affairs, it remains so although the rights of individuals are involved in its exercise.

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[82] 357 U.S. at 129.

[83] The Steel Seizure Case. See notes 67 and 68 *supra.*

[84] See notes 66 and 68 *supra.*

[85] 357 U.S. at 129.

It must be concluded that when the Court says that a power acknowledged to be a significant factor in foreign relations is not exercisable by the Chief Executive in the absence of congressional delegation, it must be declaring, in reality, that the power's exercise *at this time and under these circumstances* bears no "reasonable relation" to the conduct of foreign affairs. This is tantamount to saying that the President would, in exercising this power, be denying "due process" to the passport applicants in the principal cases.[86]

Such decisions are serious constitutional declarations. Serious not so much to individuals (who are protected by "due process" in either case) as to the country as a whole which finds its chief diplomat deprived of an important instrument of foreign diplomacy.

Conclusion

This discussion has described how three men, seeking passports in order to travel to diverse foreign destinations, involved the country's highest court in another exercise in balancing the interests of the individual with those of the state. It was seen that the problem, substantially, was one of first impression for the Court; the reason being that absolute restrictions on international travel were foreign to this country in times of "peace" prior to the end of World War II.

The sources of the Secretary's power to so restrict travel could only have been two: either he was delegated the power by Congress or the power was one "inherently" the President's. That the power to establish categories of passport eligibility had been "delegated" to the President or Secretary was difficult to establish. There was no quarrel with the Court's declaration that such power had not in fact been given by the Congress.

But the question of whether the power was "inherent" in the President as incident to the conduct of foreign affairs (an area peculiarly within the province of the executive) presented a more complicated picture. The difficulty seems one of keeping decisions regarding what constitutes the proper *exercise* of a power separate from considerations of *where a power resides* initially.

The Court was understandably anxious to avoid the adjudication of a serious constitutional question involving the personal liberty of a citizen. But in its decision it has necessarily declared upon an equally serious constitutional question involving the basic distribution of powers within the national government. For this reason, clarification of issues and adroit separation of superficially similar but fundamentally different problems would seem the order of the day for any decision of this kind—especially for those involving the defensive posture of the nation in international politics.

Notwithstanding this need, the Court in the cases which Mr. Dayton, Dr. Briehl, and Mr. Kent brought before it announced that the President had not this particular control over foreign travel in the absence of an express delegation from Congress. The Court could not be saying that the

[86] See Shachtman v. Dulles, 225 F.2d 938, 943–44 (D.C. Cir. 1955).

only regulation of individual "liberty"—*of any kind*—which the Constitution admits of must spring forth "pursuant to the law-making functions" of the Congress. Such a notion would be patently erroneous.

Therefore, the Court was declaring either that the authority to control the foreign travel of citizens was so essentially a "domestic" function that it could not be recognized as *ever* falling within the inherent powers of the President or it was saying that his actions in these cases were, in the absence of war, *not a proper exercise* of his admitted "inherent" powers over the nation's foreign affairs. The former alternative seems highly unrealistic.

The Supreme Court is shouldered with responsibilities far wider than the demands of any particular case. The Court not only declares the supreme law of the land but, for practical purposes, it *defines* the authority of the federal government. And it is not an exaggeration to say that that government may be, in times like these, all that stands between the citizen and foreign domination. Therefore, where the avoidance of a declaration of law results necessarily, by implication, in an authoritative definition of the powers of a branch of government, the Court ought to choose a path which will shed the greatest possible light on the issue actually decided. In the long run decisions made by positive declaration, even if resting upon concepts not fully explored, are apt to be more beneficial to all concerned than any practice which leaves vital issues to be answered by negative implication alone.

Nevertheless, the Court in these most recent passport cases declined to make precise definitions of the "emergency" *or* the "inherent" powers of the executive. Opportunities for authoritative delineation of these powers are likely to arise more frequently in coming years. It is to be hoped that the Supreme Court of the land will not for long refrain from expressing itself clearly and positively in this increasingly vital area of constitutional law.